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SO-CALLED "DE FACTO" RECOGNITION

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I

A usage seems to have sprung up in quite recent years of distinguishing between two kinds of recognition of new states and governments, under the names of Recognition Simply and *De Facto* Recognition. It will be our attempt in the following pages to show that the asserted distinction has no foundation in fact, and rests on a misapprehension.

International law reposes on facts, and takes little account of hypothesis. Uniting as it does the most diverse varieties of opinion and mentality, it pierces down to fundamental facts regarding which dispute and denial are next to impossible. Is there, in any given tract of country, an authority in fact obeyed throughout that area, and not threatened in the field by any real efforts of subjugation by a sovereign to which it has hitherto been subject, then that district is a state, and the authority is its sovereign. Whether it has any constitutional, moral, or legal right to break away from its former sovereign is a matter of the most perfect indifference. International law is superbly careless of these matters. Convince her that you are supreme, and she does not inquire about the weapons by which you ascended the throne.

But of course the question of supremacy, like many other questions of fact, is not always capable of easy decision. And the decision of the question in a favorable sense by other nations is of the first importance to a nascent state, or a new government. Such a favorable decision is termed recognition. It does not create the state or the government, but it is good evidence—in fact the best evidence—of its existence. A new state cannot demand recognition, because it does not, technically speaking, require it. But without recognition its position is insecure and difficult. Recognition need take no fixed form. Any entry into relations with the new state, as a governing authority, implies recognition of its state-hood. The same, *mutatis mutandis*, is true of the new government of an old state.

A state exists when it has a separate government, whether other states enter into relations with that government or not: whether they affect to "recognize" it or not. But in modern state life it is held to be a manifestation of a highly unfriendly disposition for one state to refuse all formal intercourse with another. Consequently the refusal of recognition to a government which has succeeded in establishing its supremacy in a settled fashion, is a grave step, amounting to a declaration of unfriendly feeling.

Nor can one state, or any combination of states, refuse this recognition to a new state or to the new government of an old one simply

because it is autocratic or democratic, protectionist or proletarian, heathen or Christian—in other words, because it does not agree with it or does not like it. If it does refuse recognition when the new authority has proved its solidity, it commits the serious international offence of refusing due respect to a sovereign state: unless indeed it constitutes a menace to its own peace and safety.

It follows from this that recognition cannot be conditional. It is impossible to recognize a fact conditionally. Either it is a fact or it is not. The very essence of recognition is that the recognizing state thereby declares that it has satisfied itself that the recognized authority possesses the distinguishing marks of a state. To say that one recognizes that it has them, subject to their being subsequently proved, is a contradiction in terms. To say that one recognizes that it has them, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is right if she will promise to be a good girl.

Recognition, when it occurs, must be unqualified and complete. Either the organization in question is a state or it is not. If it is a state, it is as a full-fledged state that it must be recognized—if it is not a state, it cannot be recognized at all. International law knows of no chrysalis states. Similarly, if it is a question of recognizing a new government, it cannot be recognized except as such. If it has not completely displaced the old government, it ought not to be recognized at all. If it has completely displaced it, then it constitutes a government on an equal footing with every other.

Sometimes it is convenient to enter into relations with an organization which is attempting to form a state, or to subvert a government. This would ordinarily be a mortal offence to the state whose territory it is trying to reduce, or whose government it is endeavoring to subvert. As we all know, convenience is allowed to deprive the act of its sting, and, if it is really calculated to benefit the stranger state out of all proportion to the injury, if any, done to the established government, such relations can be formed under the title of Recognition of Belligerency. As a belligerent organization, the rebels, or the rebel province, are temporarily dealt with as if they constituted a state—but only within the measure of necessity. Thus, their exequaturs may possibly be accepted, while their envoys are not; their prize-decrees may be respected whilst their currency may not be; there is no limit to the variety of treatment which may be accorded to them, provided always that it is within the fair limits of necessity.

Now one source of confusion is that this anomalous "Recognition of Belligerency" has occasionally been termed "De Facto Recognition," because it is the recognition, as possessing some few of the attributes of state-hood, of persons *de facto* behaving as belligerents.

It cannot be considered a good nomenclature—because it suggests that it is as states or quasi-states that the belligerent newcomers are

recognized. But it is precisely the fact of their state-hood which is in suspense. What is recognized is simply the fact of their temporary cohesion and momentary independence of control.

It is but as communities in fact temporarily possessing all the attributes of states that communities are recognized as belligerent. They are recognized simply as organizations in fact carrying on operations comparable to those of war. So that the phrase "de facto," in this connection, is misleading, if it suggests that these organizations are regarded as *de facto* states instead of, as is really the case, organisms, not states, and not entitled to wage war—but *de facto* belligerent.

But although the phrase may lend itself to criticism on this ground, and has in fact given rise to dangerous false analogies accordingly, it is unexceptionable in its incorporation of the words "de facto."¹ Because here we have a true opposition between a power clothed in the eye of international law with both *de jure* and *de facto* authority (viz. the established and still active government), and that which wields a *de facto* authority only. When the last shred of force departs from the *de jure* power, its moral force, if it has any, avails it nothing in the eye of international law. In ceasing to have any remnant of force *de facto* it simultaneously ceases to be a *de jure* authority. We must be excused for insisting so often on this elementary axiom—our plea must be that it frequently seems to be too elementary to be remembered.

The ambiguity between the conceptions "state" and "government" forms another source of confusion here. No one calls *de facto* belligerent insurgents "de facto states"—but we not infrequently do find them called "de facto governments." It is tempting to slide from these *de facto* governments, which are not the governments of states, to those other so-called *de facto* governments which are—viz. sovereign usurpers;² and to fancy that the latter share the uncertain and circumscribed position of the former. But there is the deepest of gulfs between them. The so-styled "de facto" government of the sovereign usurper is a perfect state. "De facto" here is a mere term of abuse. The "de facto" government of the insurgent belligerents is not the government of a state at all. Its position is in no respect analogous to that of the government of a thoroughly successful revolution. *De facto* belligerents they are; but not *de facto* states. A *de facto* state is simply a state.

¹ The words are often used in state papers as denoting the organization of insurgent forces. E. g. President Grant's special message concerning Cuba, June 13, 1870—"To justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents, sufficient in character and resources to constitute it, if left to itself, a state. . . ." And Earl Russell's note of Nov. 20, 1861, to Mr. Adams in which he used the term "de facto government" as equivalent to the term "belligerent insurgent government." Also the Earl of Kimberly's note of Nov. 3, 1871, to the Earl of Belmore, where the phrase appears to be employed in the same sense. 1 Moore, *International Law Digest* (1906) 235.

² See the distinction well marked in *Williams v. Bruffy* (1877) 96 U. S. 176.

And again, the persons who have seized, and conclusively seized, on the powers of government in a given country, are not only the "de facto" government; they *are* "the government." Other countries may recognize the fact or not; it makes no difference. The usurpers may be "only" a de facto government from the point of view of their political opponents, or even from that of their own lawyers, but internationally they are the government. If recognition be refused them, it is an unneighborly and unfriendly act; eventually a real offence.

One country cannot presume to tie up another in the chains of that other's own law. Still less can it bind it by the ideas of law and politics which recommend themselves to itself. Its only safe course is to accept the logic of *faits accomplis*.

We have therefore three clear-cut conceptions:

1. Recognition of belligerency ("de facto belligerency") in the case of insurgents.
2. Recognition of the independence of insurgents within a certain area.
3. Recognition of the victory of insurgents and their substitution for the old government throughout its whole area.

Such victorious insurgent governments may popularly be styled "de facto" governments. But the recognition extended to them cannot be split up into "de facto" recognition and something further called "full recognition." A de facto independent government, free from all serious challenge by the old authority, is a de jure government in the eyes of international law.³ It is just as valid a government as any other. It is "a government de facto in the most absolute sense, such as that of England under the Commonwealth, first under the Parliament and afterwards by Cromwell as Protector."⁴

A sort of pretension has, however, recently been put forward to treat such governments as somehow on a lower plane than that occupied by normal nations; to treat their representatives with a minor degree of consideration, and to place them, so to speak, in the position of probationers, whose license might be revoked at any moment. Thus Mr. Wilson, in recognizing the unchallenged supremacy of the government of Carranza in Mexico, attached to the recognition on the part of the United States the condition that a constituent assembly should be summoned and confirm Carranza's presidency.⁵ It cannot be too empha-

³ "So far as we are concerned," wrote Van Buren in 1829, "that which is the government de facto is equally so de jure." Van Buren to Brown, Oct. 20, 1830, cited 1 Moore, *op. cit.* 137.

⁴ *Thorington v. Smith* (1868, U. S.) 8 Wall. 1, 9-11.

⁵ Germany, indeed, in 1871, required that the French Republican Government which succeeded that of Napoleon III should be accepted by a constituent assembly before being duly recognized. But this was because the Republican Government was not in obvious supreme control. Under other circumstances, the Powers would have waited to see the development of events before according it recognition. Needing

tically stated that any such attempt to impose conditions is an illegitimate interference in the domestic concerns of a foreign country. In the

a speedy decision, Germany undertook to accept the verdict of a constituent assembly as equivalent to demonstration. Obviously no general rule can be drawn from the peculiar circumstances of a conquered and occupied country. The German forces were in fact supreme. It could not be said whom the French would obey, if they were left to themselves. Yet the Napoleonic government had disappeared. The expedient resorted to was the most practical one in the circumstances.

It appears from Mr. Thiers' *Memoirs* (Atkinson's transl. 1915) that it was really not the Germans, but the great neutrals to whom the insistence on the vote of a National Assembly was due. Bismarck said quite candidly (at p. 75) there were three courses—to recognize a Republic, to restore the Kingdom, or to restore the Empire; clearly no popular vote was needed for any but the first of these. This was on Nov. 1st, 1870. Six weeks earlier (Sept. 16) Thiers had found Lord Granville insisting on the value of a vote (at p. 18), and the British proposal for an armistice was avowedly made with a view to facilitating the meeting of such an Assembly which Gambetta opposed tooth and nail to the last. See p. 59 *et passim*. The volume is of considerable interest as showing the attitude of states in the presence of a collapse like that of the French Imperial Government. The *coup* occurred on September fourth. On the 14th, Thiers called on Granville, the British Secretary of State, and found him naturally uncertain as to the extent to which the new government was accepted by France as a whole. "So far," he said (at p. 18) "nothing has given the government established at Paris on the 6th of September a fixed character, or we should fear to go too far and too hastily in recognizing it. If to-morrow, for instance, a shock overthrew it, what sort of figure should we cut? Or, if any vote had given your country an opportunity to sanction its new government, we should not hesitate. But why put off the elections so long?" We may comment that "a shock" might just as well happen after the elections as before them: Thiers, indeed, brushed aside the attachment of Granville to an election, observing that "if it was such a manifestation that England (Great Britain) desired before recognizing the French Government, she might recognize it instantly, for the government would be as indispensable in a month's time as it was at the moment" (i. e. the mere fact of an electoral vote could make no difference to the solid circumstance that the Government was one dictated by the necessities of the situation). At the same moment Bismarck was writing to the British Government that the French Government "would be incapable of exacting obedience" from the people it professed to govern, and even Thiers admitted that it would only be obeyed "so long as it would demand nothing of [the troops] that could offend their patriotism." Gortschatcoff, again, on the 27th, in Saint Petersburg, remarked: "Here we ask whether your Republic is a serious thing: and I cannot assure us that it will exist for long." (at p. 34, 35) This attitude of uncertainty was betrayed also by his master (Alexander II). "For myself, I have no objection to make to a republican form of government. And that too does not concern us, it concerns only France. I only fear . . . the instability that is so little of an inducement to treat with a government." (at p. 39.)

But surely an unstable government is better than none to treat with. An existing government with which you refuse to treat is little better than a hostile one. Thiers, however, himself admitted, when among friends in Paris (Oct. 30th) that, "the internal government of France at the moment is practically non-existent." (at p. 68.) Under these circumstances, it is not to be wondered at that foreign nations were dubious about recognition. Probably it was also felt that the result of an Assembly vote might be, not so much to confirm, as actually to create a real government in such a country as France.

particular instance cited, it was an attempt to exalt the machinery of voting and electioneering which is characteristic of modern politics, into a requirement of the Law of Nations. It was an assumption that *Astraea* is a child of the Boss and the Caucus. Far be it from us to approve or to hail the use of force as a political weapon. But it is perfectly possible that the real opinion of the country may be better represented by the authors of a coup-d'état than by the notoriously untrustworthy verdict of a plebiscite.

There is only one safe rule for the foreigner; and that is to ask and answer the simple question of fact—is the authority supreme?

The singular idea that we may go on to inquire "is it popular?" seems to be traceable to Jefferson. Although Jefferson's authority as a publicist is somewhat under an eclipse to-day, the present writer confesses to a high admiration for his insight and ability. In this particular instance, however, his opinion was motivated by his democratic theory, and it does not seem to correspond with the universally admitted principle that forms of government are indifferent in the eyes of the law of nations. He prefaces it, in fact, by a declaration of political principle—that the United States cannot, consistently with their own political history, decline to recognize the legitimacy of a government which is "formed by the will of the nation, substantially declared."⁶ Between this and what I venture to think the more orthodox doctrine, that the actual fact of supremacy is decisive, there is only a verbal difference. It must always be easy to represent the government which is in fact supreme, or supreme by the will of the nation. Jefferson never laid down the further doctrine that the will of the nation must be ascertained by the vote of a so-called "constituent assembly." Such a doctrine, in the ultimate analysis, would amount to substituting for the proposition that forms of government are indifferent to international law, the novel proposition that electoral manipulation and majority decision is the chosen touchstone of international law. And this is a proposition which must be seriously disputed, and one which Jefferson would surely not have been inclined to maintain. Its adoption would lay upon foreign states the duty of examining the constitutions and electoral processes of other countries—of deciding on the fairness of the mode in which the vote had been conducted and on the representative character of the constituency selected. Opportunity would be afforded to ill-disposed governments to withhold recognition of a revolutionary government indefinitely, on the plea that they are not satisfied of the completeness of the popular approval. Every subjective test is weak, as compared with objective tests. International law, which is not too strong in itself, perforce is driven to adopt clear, objective, and certain tests. You can tell, for it is a matter of objective fact, whether armed resistance is going on. You cannot tell whether a vote represents the "will of the

⁶ Jefferson to Morris, Nov. 7, 1792; March 12, 1793.

nation." There is no such unique "will." The meaning of a particular vote can always be disputed. Besides, does international law forbid a nation to organize itself without reference to the voice of its ill-instructed, crowd-emotional, less civilized members?⁷ Up to our own day, most political thinkers must have contemplated the summary exclusion of half the adults of the nation.

Such a dogma takes no account of the fact, or at any rate the possibility, that a nation is the embodiment of an idea, and that, in the maintenance and fulfillment of that idea, the momentary opinion on world-politics of the majority of adult men citizens is of only secondary significance.

The truth is that any such attempt to prescribe to a country its fundamental organization is beyond the sphere of international law. It would afford innumerable opportunities for improper interference on the part of other nations. International law does not, and cannot fairly, ask of a new government: "Is it approved by some constitutional machinery?"; it is obliged to ask: "Is it obeyed?"

The French "royal" government of 1789 had fallen. The King was deposed in 1792. The National Assembly appealed to the country to elect a national convention, and meanwhile the government seems to have regarded itself as incompetent to perform any but routine functions. This curious situation, of a government declaring itself incompetent, ought not to be allowed to embarrass foreign nations. Every constitutional government, is, constitutionally, more or less incompetent. But each is internationally considered sovereign, and its incompetence is no excuse for not fulfilling its international obligations or for repudiating its international powers. The revolutionary government was in fact obeyed throughout France, and it is submitted that in carrying on official but limited intercourse until its approval by some electoral process evolved by itself was a mistake. If it was supreme, it should have been recognized as the Government of France. If it was not, the approval of an assembly organized by itself would not make it so.⁸

The distinction which Jefferson unfortunately did make, between a government acknowledged by "the will of the nation" with which *all* kinds of business can be officially done, and "a government *de facto*"—which, if it means anything, means "actually supreme," with which *some* kinds of business can be officially done—has, it is submitted, no support in the writings of publicists, and is calculated to introduce the greatest dangers into the mutual relations of states, and especially to subject weak states to the likes and dislikes of the strong. It is the

⁷ Randolph squarely puts the title to recognition on the assent of "a majority" of the people,—presumably he means males. Randolph to J. Q. Adams, Feb. 27, 1795, cited 1 Moore, *op. cit.* 128.

⁸ See 6 *Jefferson's Writings* (Ford's ed. 1895) 199. 3 *Jefferson's Works* (Washington's ed. 1853) 489; and American State Papers, Foreign Relations, 333, 334, cited 1 Moore *op. cit.* 120.

complementary dogma to that of the Holy Alliance—"only governments of a type we approve shall be permitted." It arose, however, out of peculiar circumstances. The coup d'état of 1792 eliminated the King; turned France into a Republic, and made the Executive Council practically the supreme authority. But both it and the legislative authority (the National Assembly) disclaimed their own competence to transact the affairs of the nation, unless and until they should be confirmed by a "Constituent Assembly." In the face of this disclaimer of competence, Jefferson can hardly be blamed for distinguishing between such an executive and a regular responsible government. Perhaps a better course might have been to insist that a government actually obeyed throughout France could not insist that it was not the government of France: but the difficulties of the situation were great.

It is perfectly proper to avoid precipitate recognition, and to examine carefully the question of whether a revolutionary government is or is not in fact supreme. But it must always be a question of fact. Naturally, again, if a government expressly informs the world that it has no constitutional power to do such and such things, the world must take notice of that declaration so far as matters of contract are concerned. And to this extent, Jefferson's acts, if not his language, was justified. There is no sense in paying money to a government which says it has no power to give a receipt, and which indicates a reasonable process which it considers will invest it with such power.

But this is a very different thing from prescribing to the government constitutional conditions which it must fulfill before it will be recognized as the government of the country. Jefferson's conduct in directing the American envoy in Paris to have official relations with the revolutionary government for (it would seem) all purposes save such as they themselves disclaimed authority to deal with, was really a recognition of that government as the government of France, coupled with an acquiescence in its voluntary restriction of its powers.

No plebiscitary or conventional approval was exacted by America as a condition of her recognizing Napoleon I in 1802, Louis XVIII in 1814, and Louis Philippe in 1830. Nor, as far as the writer knows, was there any electoral confirmation of Michael in 1829 as King of Portugal. The Republic of 1848 was accepted *ab initio* without waiting for electoral ratification; and, on this occasion, Mr. Buchanan used the terse and accurate words which may here be cited:

"In its intercourse with foreign nations the government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and reform their political institutions according to their own will and pleasure. We do not go behind the existing government to involve ourselves in the question of legitimacy. *It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows.*⁹ This principle of action, arising from our sacred regard

⁹ Italics ours.

for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal."¹⁰

And Mr. E. Livingstone twenty years before had written in the same sense:¹¹

"It has been the principle and the invariable practice of the United States to recognize that as the legal government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of the people."

In this form, a reference to the assent of the people is harmless, being made to depend on a definite objective test.¹² It is in this sense that President Franklin Pierce¹³ speaks of "a government *de facto* accepted by the people of the country." The absence of opposition is proof positive of the popular assent.

On the occasion just referred to of the usurpation of Napoleon III, the plebiscite followed closely on the assumption of power by the Prince-President. The change in the constitution was really not a matter that called for the notice of foreign nations. Napoleon, the Prince-President with limited powers, became Napoleon the Prince-President with extended powers. But he was the same Napoleon, and the whole corps diplomatique continued to have relations with his government. The American representative formed an exception, and waited three weeks until the farce of a plebiscite had been accomplished. On Napoleon's subsequent assumption of the title of Emperor, no difficulty was encountered.

The establishment in 1870 of a Republic under a "provisional government" was immediately recognized (Sept. 7) by the American government, without waiting for its confirmation by the "National Assembly." And five successive revolutionary governments had been recognized summarily in the course of a few months each as the political power of Mexico by the United States.¹⁴ Evarts, however, in 1879, declined to enter into official relations with Blanco in Venezuela, until he had gone through the solemn farce of obtaining the approval of a congress which he had summoned. Meanwhile Evarts continued unofficial relations with Blanco, and although fully admitting his title to recognition, he

¹⁰ Buchanan to Rush. March 31, 1848, cited 1 Moore, *op. cit.* 125.

¹¹ April 30, 1833, cited, 1 Moore, *op. cit.* 129.

¹² Mr. Pickering (March 28, 1799) declined to recognize the "Roman Republic," because it was only a mode of French power.

¹³ Message to Congress, May 15, 1856.

¹⁴ Special message of President Franklin Pierce, H. Ex. Doc. 103, 34th Congress, 1st Sess. 5. See 1 Moore, *op. cit.* 146.

The government of Marshal Serrano in Spain was recognized by the United States although it had dissolved a republican government by military force; and, as far as appears, no popular vote had confirmed its supremacy.

excused the suspension of it on opportunist and frankly unconvincing grounds;¹⁵ conduct which, if we may use Woolsey's stately words regarding Puffendorf, "it gives us pain to cite in such a writer."

He had some support from an earlier attitude taken up by Mr. Seward, who, while "not intending or desiring to question the rightfulness or the stability of the government provisionally existing¹⁶ in Salvador," declined for the moment to make a formal recognition of that government.¹⁷ This action of Mr. Seward's in 1864 may probably be regarded as the immediate parent of the modern heresy. In itself, it was not objectionable. There had been a revolutionary movement in Salvador. It had been, apparently, attended by great success. But its success can not have been complete, as there still existed "armed opposition" to it. Two logical courses were open to Seward. He might have said that the opposition was negligible, and that the insurrectionary government had now proved its title to be regarded as definitely substituted for the one with which the United States had formerly been in relations. In that case he should have recognized it. Or, he might have said that the evidence of displacement was not yet complete. In that case he ought not to have refused—as he did refuse—to receive the authorities of the government with which his country had been in formal official relations. A government does not become an outcast because it is reduced to dire extremities.

Seward—saying in effect that the evidence of displacement was and was not complete—took a third course. He received unofficially the representatives of the insurgent government, and he declined to receive at all the representatives of the established government, reduced as it was to such straits.

For such an action one can see little excuse beyond the convenience of the moment. The declining to receive officially the envoy of the usurping power, was, as we have seen, perfectly unobjectionable. A state may always claim time to satisfy itself that the new government has really overcome all opposition, before it extends to it its recognition. If there still were armed forces in the field against the new Salvador government, the only fault to be found with Mr. Seward's pronouncement in this respect must be that it went too far in styling it "the government." Where the Secretary of State appears to be justly open to criticism was in treating the representatives of the still struggling old government in the light of rebels against "the" government of the country. This may be explained, if not excused, by the pressure of the Civil War on Mr. Seward's attention in the critical days of January, 1864.

The action of President Rutherford Hayes, when in 1877¹⁸ he carried

¹⁵ 1 Moore, *op. cit.* 151.

¹⁶ In a second note he calls it "actually existing."

¹⁷ See 1 Moore, *op. cit.* 237.

¹⁸ *Ibid.*

on for more than a year informal intercourse with the Diaz government of Mexico, though declining to recognize it, occupies quite a different plane. It was really, paradoxical as it seems, and little as Hayes may have suspected it, a case of recognition rather than of non-recognition. The frontier was in disorder, and the President declined to enter on diplomatic relations with the Mexican government accordingly, just as in other circumstances he might have suspended them. The European governments had recognized Diaz at once. We must avoid the mistake of confounding diplomatic intercourse with recognition. It is a common mark of recognition. But it is not essential to it. All that Hayes (and perhaps all that Evarts in the Venezuela case above cited) really did was to temporarily decline official diplomatic intercourse with a disturbed state—and in that they were clearly within their right. Seward's mistake in the Salvador case lay in according discriminatory unfavorable treatment to the old and still struggling government.

But Mr. Gresham went a good deal further than either of them, in 1893, directing the Minister to Nicaragua to maintain formal intercourse with the authorities in control at the seat of government, while leaving open the question of "formal" recognition.¹⁹ This seems entirely contrary to principle. Mr. Gresham intimated that the intercourse of the American Government with the country would thus have "a provisional and de facto character." The grave objections to intercourse of such a kind are obvious. Where, indeed, is the "seat of government"? Surely it is where the authority, with which foreign powers are in formal relations is established. A government does not cease to be a government because it is temporarily driven from its capital.²⁰ The new Tajos doctrine, according to which the American powers would afford no existence to revolutionary governments, shows the enormous encouragement which Mr. Gresham's doctrine was calculated to give to insurrection. Let only a soldier or politician make an émente in the capital, and, presto! the government ceases to have any claim to represent the nation, and both itself and the opposition fall en bloc out of the rank of states, and have no more than the privilege of belligerents.²¹

When in 1868 Mr. Seward recognized a revolutionary change of government in Costa Rica, he did so without waiting for the call of a national convention.²² This was a bloodless revolution; but in 1899

¹⁹ *Foreign Relations of the United States*, 1893, 212.

²⁰ Cf. Cass' instruction to McLane, cited *infra* note 33.

²¹ Mr. Hay was perhaps justified, in 1899, in delaying to "recognize" what he admitted to be the "unopposed" existing government of San Domingo. 1 Moore, *op. cit.* 240. A state may reasonably be allowed some time for appraising the situation, and for stating its definite mind. He was less happy in declaring that until the new government is notified of the desire of the stranger to enter into diplomatic relations with it, its existence is "*merely* (italics ours) a matter of common notoriety." Common notoriety goes for a good deal in international law.

²² Moore, *op. cit.* 144.

Castro's seizure of power in Venezuela was at once recognized without any reference to popular vote.²³ So in Bolivia in 1866.²⁴ In 1899²⁵ the envoy to Bolivia was instructed to enter into relations with the junta if the government was de facto administered by it according to regular methods affording reasonable guaranties of stability and international responsibility, and without organized resistance. He did, in fact, await the decision of a constitutional assembly, but this formed no part of his instructions. Mr. Hay's instructions to the Minister to San Domingo in the same year are couched in the same sense:²⁶

"Upon your being satisfied that the new government of Santa Domingo is in possession of the executive forces of the nation and administering the public affairs with due regard for the obligations of international law and treaties, you will enter into full relations with it." (Nothing is said about its permanence, one observes.)

As Mr. Fish wrote in 1870:²⁷

"We have always accepted the general acquiescence of the people in a political change of government as a conclusive evidence of the will of the nation. When, however, there has not been such acquiescence, and armed resistance has been shown to changes made or attempted to be made under the form of law, the United States have applied . . . the rule that the organization which has possession of the national archives and of the traditions of government, and which has been inducted to power under the forms of law, must be presumed to be the exponent of the desires of the people until a rival political organization shall have established the contrary."²⁸

²³ *Ibid.* 153.

²⁴ *Ibid.* 154.

²⁵ *Ibid.* 155.

²⁶ *Ibid.* 163.

²⁷ Fish to Sickles, Dec. 16, 1870, For. Rel. U. S. 1871, at p. 792.

²⁸ The doctrine is admirably expressed in the note addressed by William Pinkney to the Marquis di Circello under date of Aug. 26, 1816:

"The general principle, that a civil society may contract obligations through its actual Government, whatever that may be, and that it is not absolved from them by reason simply of a change of Government or of Rulers, is universally received as incontrovertible. It is admitted, not merely by Writers on Public Law, as a speculative truth, but by States and Statesmen, as a practical rule; and, accordingly, history is full of examples to prove, that the undisturbed possessor of Sovereign Power in any society, whether a rightful possessor or not, with reference to other Claimants of that power, may not only be the lawful object of allegiance, but by many of his acts, in his quality of Sovereign, de facto, may bind the society, and those who come after him as Rulers, although their title be adverse to, or even better than his own. . . .

"It will not be pretended, that a merchant is called upon to investigate, as he prosecutes his traffic, the title of every Sovereign, with whose Ports, and under the guarantee of whose plighted word, he trades. He is rarely competent. There are few in any station who are competent to an investigation so full of delicacy, so perplexed with facts and principles of a peculiar character, far removed from the common concerns of life. His predicament would be to the last degree calamitous, if, in an honest search after commercial profit, he might not take Governments as he finds them, and consequently rely at all times upon the visible exclusive acknowledged possession of Supreme Authority.

"If he sees all the usual indications of established rule; all the distinguishing concomitants of real undisputed power; it cannot be that he is, at his peril, to discuss mysterious theories above his capacity or foreign to his pursuits, and moreover, to connect the results of those speculations with events of which his knowledge is either imperfect or erroneous. If he sees the obedience of the People, and

II

Much current popular talk proceeds on the footing that a state endures always and for ever, whether it has a settled government or not. Such a position is unknown to all the authorities on the law of nations. If a nation ceases to have a government, it ceases ipso facto to be a state. Clearness and certainty are imperatively demanded by international law, which has no lawgiver and no judge to clear up uncertainties. Its dictates must necessarily proceed on clear and simple grounds, and embody clear and simple principles. The rule that a recognized government remains the government until finally reduced to impotence cannot be undermined without destroying the very basis of confidence and state security. To admit that persons who deliver a successful attack on it thenceforward become entitled to some indefinite share of its powers in regard to foreign states is a fundamentally anarchic principle. A more or less successful rebel, thus "provisionally" recognized, will claim to discharge and incur liabilities on behalf of the state—and the conse-

the acquiescence of neighboring Princes, it is impossible that it can be his duty to examine, before he ships his merchandize, whether it be fit that these should acquiesce or those obey. If, in short, he finds nothing to interfere with or qualify the dominion which the head of the society exercises over it, and the domain which it occupies, it is the dictate of reason, sanctioned by all experience that he is bound to look no farther.

"It can be of no importance to him that, notwithstanding all these appearances announcing lawful rule, the mere right to fill the Throne is claimed by, or even resides in, another than the actual occupant. The latent right (supposing it to exist) disjoined from and controverted by the fact, is to him nothing while it continues to be latent. It is only the Sovereign in possession that it is in his power to know. It is with him only that he can enter into engagements. It is through him only that he can deal with the society. And if it be true, that the Sovereign in possession is incapable, on account of a conflict of title between him and another, who barely claims, but makes no effort to assert his claim, of pledging the public faith of the society and of the Monarch to Foreign Traders, for commercial and other objects, we are driven to the monstrous conclusion, that the society is, in effect and indefinitely, cut off from all communication with the rest of the world. It has, and can have, no organ by which it can become accountable to, or make any contract with Foreigners, by which needful supplies may be invited into its harbours, by which famine may be averted, or redundant productions be made to find a market in the wants of strangers. It is, in a word, an outcast from the bosom of the great community of Nations, at the very moment too, when its existence, in the form which it has assumed, may every where be admitted. And, even if the dormant claim to the Throne should, at last, by a fortunate coincidence of circumstances, become triumphant and unite itself to the possession, this harsh and palsyng theory has no assurance to give, either to the society or to those who may incline to deal with it, that its moral capacity is restored, that it is an outcast no longer, and that it may now, through the protecting will of its new Sovereign, do what it could not do before. It contains, of course, no adequate and certain provision against even the perpetuity of the dilemma which it creates. If, therefore, a civil society is not competent, by rulers in entire possession of the Sovereignty, to enter into all such promises to the members of other societies as necessity or convenience may require, and to remain answerable for the breach of them, into whatsoever shape the society may ultimately be cast, or into whatsoever hands the Government may ultimately fall; if a Sovereign, entirely in possession, is not able, for that reason alone, to incur a just responsibility, in his political or corporate character, to the Citizens of other Countries, and to transmit that responsibility, even to those who succeed him by displacing him, it will be difficult to show that the moral capacity of a civil society is any thing but a name, or the responsibility of Sovereigns anything but a shadow." Pinkney to Circello, Aug. 26, 1816. 5 *British State Papers*, 206 *et seq.*

quent confusion will be inextricable. On the other hand, if the rebel is not recognized, and recognition is withdrawn from the stricken but existent government, there is no one left to represent the state, and a grave injustice is done to it.

Such a hazy semi-recognition as was directed by Mr. Gresham in 1893²⁹ is productive of the unhappiest results. Where precision and certainty are supremely desirable, it throws all into uncertainty and chaos. Any military swashbuckler can in an afternoon deprive the state of its international existence, and reduce it to a nest of anarchs. If we lose hold of the clear principle that a government is a government until it is regularly displaced by reduction to impotence, we lose ourselves in mazes in which the independence and the right of states are swallowed up.

One cannot, however, but be conscious that in cases where a change of government is frequently, if not normally, affected by revolution, the theory identifying the established government with the state comes within measurable distance of breaking down. In such cases it is difficult to avoid the conclusion that the party which has seized on the capital machinery of government has substituted itself for the recognized rulers just as completely as if it had beaten them at the polls. It is this feeling that is at the root of the desire to maintain official, but "provisional" or "de facto" relations with them, to the prejudice of the defeated government, or to maintain abnormal relations with both parties as though there were no established government during the conflict. It is a respectable train of thought. But it is submitted that it is inconsistent with any coherent principle. The government dispossessed by electoral defeat acquiesces in its defeat and resigns the reins of power. A government dispossessed by revolutionary means is after all dispossessed by force. That makes all the difference. Normal and frequent as such a dispossession may be, it cannot displace the ordinary rule, that it must be overwhelming and complete in order to turn a government into subjects.

Allowance may readily be made for the difficulties of states which have dealings with others in which revolution is the normal mode of effecting a change of government. It is undeniably tempting to go on negotiating officially with the people in temporary control at the capital. It is highly inconvenient for diplomatists to follow the fortunes of a guerilla band escorting a defeated government. But the world was not made for the convenience of diplomatists. As long as we maintain the principle that a government remains the sole legitimate government until it is deprived of force, so long we must accommodate diplomacy to the law, and avoid bending the law to the exigencies of diplomacy.

Mr. Hay, in fact, in 1900³⁰ speaks of the *full* recognition of a revolu-

²⁹ *Supra* note 19.

³⁰ Hay to Hart, Sept. 8, 1900.

tionary government as "de facto entrance into relations," and contemplates the exaction by the local American agents of protection for Americans from the revolutionary authority as something to be done *pending* this "de facto" recognition: in which he seems certainly to be following correct practice. And it is worth while noting, that in 1829 and 1856 alike, there existed urgent necessity for official intercourse between the United States, and Portugal and Nicaragua respectively. In the earlier case, says Van Buren, "our commerce, left unprotected, became exposed to all the dangers and delays resulting from the want of consular documents and the absence of the public minister."³¹ In the later one, according to President Franklin Pierce,—“the most imperative special exigencies required that this government should enter at once into diplomatic relations with that of Nicaragua”—claims of Americans against the new government and the safety of interoceanic transit were at stake. Yet no "de facto" or "provisional" or "conditional" recognition was dreamed of. Full recognition was accorded. The subsequent refusal to continue intercourse with the government of Nicaragua so recognized can only be explained, and cannot be justified, by the supposition that the recognition was made under a mistake as to the actual power of the Rivas government. A nation must stand by its own mistakes.³²

It may be asked, finally, whether the institution of "de facto" recognition does not subserve the useful purpose of providing a *modus vivendi* in the case of governments which have not as yet shown their permanence. The answer is that if there is nothing in the field opposing them, there is no reason to assume their impermanence; whilst, if there is, they are not entitled to recognition otherwise than as belligerents. The proper and accustomed mode of securing the protection of foreign life and property by highly successful rebels is by recognizing them as belligerents—which is what they are. It is certain that a usurping government may properly be recognized as sovereign when the armed opposition to it is negligible; how then can recognition be refused to it, on surmises, when the armed opposition is nil?

III

In laying down the simple principle that an established government is entitled to be regarded as the government unless and until it becomes clear that it has no reasonable prospect of recovering its authority, we mask, however, a difficulty the solution of which may possibly afford

³¹ Van Buren to Brown, Oct. 20, 1829.

³² A similarly precipitate recognition was made by Blaine in 1881 of the Caldéron Government in Peru. His conditions were that it should appear to be "supported by the character and intelligence of Peru, and really endeavoring to enforce constitutional government." This was of course an aristocratic interference in favor of character and intelligence, dis severed alike from questions of legitimacy and power. See 1 Moore, *op. cit.* 157. Mr. Frelinghuysen stuck valiantly to Mr. Blaine's

some balm to the diplomat who sees with disrelish the prospect of following the flying government into the recesses of South American forests, where jaguars and alligators disprove the aphorism that "only man is vile."

That is the difficulty of area. A government may have no reasonable prospect of recovering its authority throughout the old area of its sway. But it may have every prospect of maintaining itself indefinitely in some portion of it. It would be absurd to hold (as Seward appears to have assumed) that a state is necessarily one and indivisible, and that once the government is reduced to insignificance (and, in particular, turned out of the capital), it, and the region it occupies, become subject to the usurping government, as necessary parts of the whole,³³ and thenceforth to be regarded as in mere rebellion. In the country which remains to it, and where, let it be assumed, it has every prospect of maintaining itself, it is surely as much entitled to be considered the government of a state as its rivals. The state, in short, in such a case is divided. The old government is no longer making serious efforts to dislodge the new from the capital and the main part of the territory. But the loss of its capital and territory do not extinguish a nation. Belgium was not extinguished while King Albert had a foot of Belgian home or colonial ground to call his own. It cannot be said, therefore, that, however precarious its state, the defeated government of such a country becomes a rebel government. No matter how long-continued and vigorous the efforts of the usurping party may be, they cannot claim the allegiance of their predecessors merely because they used to be their subjects.

Nor, if a government simply disappears, as the French Imperial Government did in 1871, is any government which may spring up in the area formerly ruled by it, necessarily entitled to the obedience of that whole area.

It is obvious that, in such a case, each authority which is in fact supreme in any fraction of the former united area with a reasonable probability of permanence is the head of an independent state. If none is in fact anywhere practically able to enforce its will, there is of course a condition of anarchy throughout the territory; and it lies open to the civilizing possession of any general occupant. But in so far as an authority makes its will respected in any fraction of the territory, in a reasonably permanent fashion, we have a sovereign state.

guns, but had to yield to the logic of events. Mr. Blaine spoke in 1899 of the assent of "the majority of the people" of Brazil to the establishment of the republic. It is believed, however, that this assent—and indeed the assent of the whole people—was presumed, and that no vote preceded recognition.

³³ This seems to be assumed by Cass in his instructions to McLane in Mexico, March 7, 1859. See 1 Moore, *op. cit.* 147. Although "it was not an essential condition of the recognition of a government that it should be in possession of the capitol," yet it was enough if it was "obeyed over a large majority of the country and the people," with prospects of permanence. This is surely to go too far.

The difficulties of settling the question of continuity in such cases are enormous. It seems to be the logical course to say that in the first case (the expulsion of the government from the capital and much of the territory), the old government carries on the continuity of the old state, and the new government represents a new state, whatever it may call itself. Perhaps this is to carry the principle, that a government represents the country until destroyed, to an extravagant and pedantic length. Especially has this observation force in those countries where a revolution is the usual machinery of effecting a change of government. On the whole, however, remembering that the loss of its richest provinces is not supposed to affect the identity of a state, one inclines to the maintenance of the stricter theory. Perhaps we may say that, if the territory remaining to the old government is so insignificant as to be incompatible with its bearing the name of the undivided territory, continuity is lost to it, and survives to the new government which has replaced it; otherwise, it retains continuity, and the new government stands on a new footing of its own devoid of continuity with the undivided state.

Can we go further, and say that there is a penumbral stage, at which continuity is divided between the rival sections? It seems scarcely possible. If the old government retains any substantial part of its former territory, small though it may be in comparison with what it has lost, it seems that it maintains, and alone maintains, the individual existence of the former undivided state. When the dominions of Mary, Queen of Portugal, were reduced to the Azores, by the successful attempt of her cousin Michael to seat himself on the Portuguese throne, she and her adherents did not become rebels against him. Nor did there seem at the time any such reasonable prospect of her evicting Michael as would make him remain a mere rebel against her. In our view she was thenceforth (whatever, like other monarchs, she chose to style herself) Queen of the Azores, whilst Michael was clearly King of Portugal. That she did, in course of time, unexpectedly invade and conquer Portugal, does not affect the argument. The Azores were too insignificant a portion of the undivided realm to make it reasonable that Mary should be considered sovereign of Portugal and Michael sovereign of a new kingdom of (say) Continental Portugal, Miguelist Portugal, Oporto, or Lusitania, having no connection with the affairs of the ancient realm.

The application of these territorial principles will go a good way towards providing a solution of the problem that Mr. Seward had to solve (and, as we think, failed to solve) in 1864. The defeated, but still struggling, government must have a point d'appui. A time will come at which it may fairly be recognized that its sovereignty is limited to that area. And, without doing violence to the principle that a government remains a government until it is utterly destroyed, it may yet be recognized that it has been utterly destroyed without practical hope of recall *within a certain area*. This involves the inconvenience of recognizing

that the state has been split up, but that is simply the recognition of hard fact. It involves no departure from orderly principles, and no imputation of anarchy on the nation.

We shall thus see a revolutionary outbreak followed by these legitimate results, instead of a temporary and perhaps very prolonged period of unsettlement, during which the state is regarded as having no legitimate organ of expression, or in which effect is given to an indefinite and utterly uncertain extent, at the arbitrary will of foreigners, to the acts of an illegitimate organ.

As legitimate results, we have the established government regarded as remaining the sole representative of the state so long as it is making any active effort to assert its authority, unless and until it is plain that in a greater or less area of its territory it has no reasonable prospect of ever doing so. If and when that happens, we have the insurrectionists forming a new state in the area which they control, or (in case the area which the old government controls or has still any reasonable prospect of controlling³⁴ can only be insignificant) succeeding to the representative of the old state, we shall, in the latter case, see the ejected government forming a new state in the territory which it actually controls. It will be very difficult to reduce its members and adherents to the mere category of rebels. So long as it retains permanent sway in any assignable fragment of territory, however minute, it seems impossible to say that it has not as good, or better, right to it than the government which has turned it out of the bulk of its possessions. It is only when it is reduced to a fugitive and mobile force that its position becomes precarious; nor even then can it be treated as merely rebellious, if the force is respectable, and such as to offer a fair chance of maintaining a foothold in the country somewhere, if not of re-conquering it entirely. So far its *de jure* title must profit it. It would be absurd to style a ruler, conducting a campaign at the head of a respectable force, a rebel, merely because a *pronunciamento* had put the wires of civil government throughout the country into the hands of a rival. Although his troops change their base from time to time, so that it cannot be said that he draws his support from any one definite area, still his force and his title combine to support him in the character of an independent ruler, even though it should be clear that he can never again hope to be the ruler of the entire country, or indeed of any substantial part of it. This can only be a temporary and anomalous state of things; sooner or later he must either collapse or consolidate his power in a definite area, unless indeed the miracle happens and he is restored to supremacy.

We venture to conclude:

1. That "de facto" recognition is properly the full and complete

³⁴ As when it has a mobile army, with which it is never likely to reconquer the entire country, but with the aid of which it may succeed in maintaining itself permanently in some as yet unassignable district.

recognition of a state or government *de facto*, (and therefore *de jure*) independent and supreme within an ascertained area.

2. That the "de facto recognition" of an insurgent government or province is identical with recognition of belligerency, and is inconsistent with official relations.

3. That an intermediate penumbra of official but conditional, provisional or revocable recognition, to which no one can say what are the precise consequences attached, would be useless and dangerous, whether accorded to a government supreme in a certain locality or throughout the whole extent of the country.

4. That no support for the possibility of such an ambiguous régime can be drawn from international practice.

5. That the practice of making the recognition of a government dependent on electoral machinery is an illegitimate intervention in the domestic affairs of an independent state.

International law is so entirely dependent upon the simplicity, clearness, certainty, and stability of its rules, that any attempt to complicate or depart from them is greatly to be deprecated. Recognition of belligerency there must be; but let it not degenerate and spread over into an arbitrary "de facto" recognition of persons whose only true status is that of promising rebels, nor let such an uncertain and ambiguous half recognition be thought good enough to accord to perfectly sovereign authorities whose history does not altogether please or satisfy us.

A further difficult question arises and has been well discussed by Professor Borchard,¹ as to the responsibility for the contracts and delicts of "local de facto governments," i. e. insurgents controlling a definite area of the state, and usually aiming not at replacing themselves for the existing government but merely at local independence. In fact, the whole position of *de facto* belligerents is anomalous. Suppose they offend third states: can the latter wage war against them without offence to the state from which they are trying to break away? It can hardly be doubted that no acts of theirs can prejudice the state whose authority they are disclaiming: should their efforts be successful, and their independence vindicated, then, naturally, their own responsibility follows for their own acts.

It is a very difficult question in such cases how far the rights and duties of the undivided state persist: we can only here indicate the conditions of the problem.

A. The government may be reduced to so insignificant a portion of its territory, and have so little prospect of ever recovering more, that the rebels succeed to its place as rulers of the state—though with slightly diminished territory.

¹ *The Diplomatic Protection of Citizens Abroad* (1915) 235 *et seq.*

B. The insurrection may have made good its claim to a considerable—even the major-portion of the country. The government is never likely to recover it—and it may include the capital. But the government remains in control of a considerable section—so considerable, that there is no great incongruity in calling it by the old name.

C. The insurrection may have succeeded in a limited portion only.

It seems probable that continuity of rights and obligations, as a matter of mere law, is never, even in Case B, divided *ipso facto*.

Professor Borchard² equates the powers of de facto governments established in some part only of the state affected (i. e. what we should call governments recognized as belligerent) to those of a military occupant. It is an interesting parallel: and affords a useful guide in matters, where the unstable nature of the authority is the important purpose. But military occupation essentially looks to its own eventual withdrawal: de facto government looks to its own permanent establishment and perhaps extension; military occupation is a right: de facto government is a denial of right. So that it would perhaps be unsafe to conclude that what can be said of a military occupant can always be said of a de facto local government, and *vice versa*.

Supposing the belligerent insurgents to be in military occupation of an area previously occupied by the government troops. Will anything hinge on the fact that the insurgents aim at the control of the entire state, or, on the other hand, desire a mere local independence? Is their position different owing to the fact that in the latter case their position is exactly like that of a military occupant, whereas in the former they claim to be still in friendly territory? If Professor Borchard is right in thinking their position to be always assimilated to that of a military occupant, then there is no difference. The Confederates in Virginia were in exactly the same position as the Confederates in Delaware or Maryland. Yet I think one feels there is a difference. It would be difficult to say just in what it consists.

² *Ibid.* 206-209.